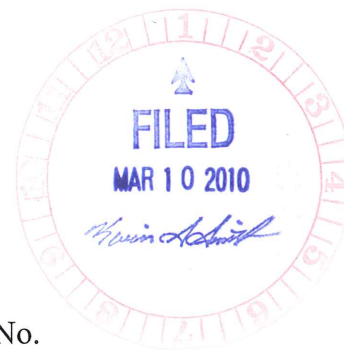


**In the
Indiana Supreme Court**



Michael FRANCIS,)	Supreme Court Cause No.
Appellant (Defendant below),)	49S02-1003-CV-137
)	
v.)	Court of Appeals Cause No.
)	49A02-0808-CV-776
Lawrence T. NEWMAN,)	
Appellee (Plaintiff below).)	Marion County Superior Court Cause No.
)	49D02-0705-PL-018176

ORDER GRANTING TRANSFER AND REMANDING TO TRIAL COURT

On May 2, 2007, attorney Lawrence T. Newman sued Michael Francis for what Newman claimed were attorney fees and expenses owed him in connection with his representation of Francis as personal representative in an estate case (the "Estate Case"). The record suggests that the Estate Case had been closed without Newman's fees and expenses being considered.

Pursuant to Ind. Appellate Rule 14(A)(1),¹ Francis appealed the trial court's August 7, 2008, order awarding Newman approximately \$5,000 in attorney fees and costs incurred in opposing Francis's motion that the trial court quash Newman's discovery request and similar motions. Francis's principal claim on appeal is that the trial court abused its discretion when it awarded Newman attorney fees and costs without a hearing. Francis also challenges the reasonableness of the award itself. The Court of Appeals affirmed in an unpublished opinion. Francis v. Newman, No. 49A02-0808-CV-776 (Ind. Ct. App. Apr. 30, 2009).

Newman made various discovery requests of Francis on October 12, 2007. Francis thereafter took a series of actions resisting discovery that ultimately led to the trial court awarding attorney fees and costs to Newman. Francis substantively argued that some of the material requested was confidential under Administrative Rule 9, some of the material was subject to attorney-client privilege (relating to the Estate Case), and some of the documents requested were already in Newman's possession from the Estate Case.

Newman responded to each of Francis's motions on the merits and further contended that Francis's objections to discovery were "frivolous, groundless, and without any merit." He asked the court to award him his attorney fees and costs in opposing Francis's motions. On June 18, 2008, the trial court summarily granted Newman's request and directed Newman to submit a statement of his fees and expenses.² On August 7, the court ordered Francis to pay Newman

¹ Indiana Appellate Rule 14(A)(1) provides an appeal of right from the entry of an interlocutory order for the payment of money.

² The trial court originally entered this order on June 11 but vacated that order when it determined that

\$5,019.69, the full amount requested.

The trial court did not enter any findings of fact or conclusions of law supporting its award but it appears to us that the court was proceeding here under the last paragraph of Trial Rule 37(B)(2) which authorizes a trial court, as an alternative sanction for any discovery violation, to require the violator “to pay the reasonable expenses, including attorney’s fees,” caused by the violation. This paragraph does not require a hearing by its terms but T.R. 37(A)(4) does require a hearing before expenses can be imposed for the violation of a motion to compel discovery. Newman argues that that requirement is not applicable here because the trial court was not enforcing a motion to compel. While that is true in terms of the nomenclature employed, we believe the practical effect of the trial court’s action was to sanction Francis for not responding when he was compelled to do so and, as such, the hearing requirement of T.R. 37(A)(4) was applicable. See also Baughman v. State, 777 N.E.2d 1175, 1177 (Ind. Ct. App. 2002) (“[T]he trial court must ordinarily conduct a hearing thereon to determine whether a reason for not imposing sanctions exists.”).

The Court of Appeals assumed without deciding that Francis was entitled to a hearing but held that Francis had “not made any showing of prejudice from such an error.” Francis, slip op. at 5. On the substance, we see little merit to Francis’s claims of Administrative Rule 9 or attorney-client privilege violations. But we are unable to resolve on this record the extent to which Francis was entitled to the records from the Estate Case, if for no other reason than what was at issue was Newman’s entitlement to attorney fees and expenses for his services in the Estate Case. Finally, we believe that Francis was entitled to a hearing to test the reasonableness of the attorney fee and expense request tendered by Newman.³

Accordingly, the Court GRANTS TRANSFER of this case from the Indiana Court of Appeals. The decision of the Court of Appeals is vacated. Appellate Rule 58(A). This case is remanded to the trial court for further proceedings consistent with this order.

The Clerk shall send a copy of this order to the Hon. John G. Baker, Chief Judge, Indiana Court of Appeals; the Hon. Kenneth H. Johnson, Judge, Marion Superior Court; Steven Lancaster, Administrator, Indiana Court of Appeals; Danielle Sheff, Deputy Administrator, Indiana Court of Appeals; and all counsel of record. The Clerk is also directed to post this order to the Court’s website.

Francis had not been served with Newman’s request for attorney fees until June 12.

³ After the trial court entered its order on June 11, referred to in footnote 2 above, Newman tendered a fee and expense request of \$3,931.94. As noted, this order was vacated and then reentered on June 18. In response to the June 18 order, Newman tendered a new fee and expense request of \$5,019.69 — an increase of more than 25%.

Done at Indianapolis, Indiana, this 10th day of March, 2010.

Randall T. Shepard
Randall T. Shepard
Chief Justice of Indiana

All Justices concur.